

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-097

ELIZABETH BURTON

APPELLANT

VS. FINAL ORDER
SUSTAINING HEARING OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

DEPARTMENT OF MILITARY AFFAIRS
MAJOR GENERAL ED TONINI, APPOINTING AUTHORITY

APPELLEE

** ** *

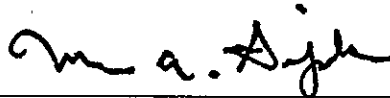
The Board at its regular June 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 20, 2014, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be, and they hereby are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **DISMISSED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 18th day of June, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Michael Van Leuven
Elizabeth Burton

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
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This matter came on for evidentiary hearing on February 19, 2014, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Geoffrey B. Greenawalt, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Elizabeth Burton, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, Department of Military Affairs, was present and was represented by the Hon. Michael Van Leuven.

The issue at the evidentiary hearing was whether or not the Appellant is entitled to additional compensation for performing duties outside of her class from February 7, 2011, through February 15, 2013. During this period of time, the Appellant was classified as an Administrative Specialist III (pay grade 12) and she claims she performed the duties of an Administrative Section Supervisor (pay grade 15). The burden of proof was upon the Appellant to demonstrate by a preponderance of the evidence that she was penalized and thus entitled to back pay.

Also before the Personnel Board is the Appellee's Motion to Dismiss, as a result of the Appellant's failure to file her appeal within the limitation period provided in KRS 18A.095(29).

BACKGROUND

1. The Appellant, Elizabeth Burton, filed her appeal with the Personnel Board on April 26, 2013, requesting back pay for performing duties outside her classification for an unspecified period of time and to review her grievance filed on March 14, 2013.

2. The first to testify was **Steve Combs** who worked for Logan Security, Inc. as the Post Supervisor at the Bluegrass Station. According to Mr. Combs he shared office space with the Appellant between February 2011 and February 2013.

3. When asked to review what was marked as Appellant's Exhibit 4, but not introduced as an exhibit, Mr. Combs testified that the job duty marked as paragraph 1 was accurate and agreed that Ms. Burton was on-call "24 hours a day, 7 days a week." He also agreed that she had a hand in performing the job duties marked as 2, 3, 4 and 5. As for job duty #6, Combs stated that both he and Ms. Burton had a hand in the training. He did explain that the Appellant trained him for the biggest part, although several employees had a hand in his training as well. He went on to agree that Ms. Burton performed the job duties marked as 7, 8 and 9. As for job duty #10, Mr. Combs stated that the Appellant reviewed the gate register and incident reports. As for job duty #11, Mr. Combs stated the Appellant prepared spreadsheets from the incident reports. Mr. Combs also agreed that the Appellant performed the job duties marked as #12. As for job duty #13, Mr. Combs stated the Appellant went to the mailroom several times a day. He, however, sorted and placed the mail in boxes and ran the mail through the postal machine while the Appellant worked on mail invoicing. Mr. Combs agreed that the Appellant did handle various complaints, etc., shown on job duty #14. He also agreed that the Appellant performed the job duties marked as 15 and stated that the marquee duties noted under paragraph 16 was more of a gray area. He stated he had also been shown how to work the marquee, but admitted he never did so himself.

4. On cross-examination, Mr. Combs stated that Logan Security, Inc. was a contractor/vendor for the Commonwealth providing security at the Bluegrass Station. His immediate supervisor was Colonel Noel Martin who also worked for Logan Security. Colonel Martin was not on-site at the Bluegrass Station, but would float from site-to-site checking on various supervisors. If a significant incident occurred, Mr. Combs would report to Colonel Martin. However, on re-direct, Mr. Combs stated that most of the time his first phone call would go to the Appellant before it went to Colonel Martin.

5. The next to testify was **Madeania Jones**, who is an Administrative Specialist III at the Bluegrass Station. Ms. Jones started working at the Bluegrass Station in 2012.

6. Ms. Jones testified that in March 2013 she took over the mail invoicing duties and ran all the mail reports. She also prepared the voicemail reports, micro-call reports, collected and reviewed the telephone billing, prepared an Excel spreadsheet for invoicing telephone bills for tenants, and also performed fuel data entry and associated invoicing report, and also handled fleet requests. Ms. Jones stated that prior to March 2013 the Appellant handled all these duties.

7. The next to testify was the Appellant, **Elizabeth Burton**. Ms. Burton testified that in February 2011 she was asked to go to security at the Bluegrass Station in order to correct certain issues. Prior to that she worked as the Administrative Specialist for Steve Collins, who was the head of Bluegrass Station.

8. Ms. Burton testified that she was out on medical leave for approximately eight weeks in August and September of 2012 which gave her an opportunity to review her job duties. As a result, when she returned to work in September of 2012 she requested a desk audit. At that time she was answering to Andre Daigle on paper, but in actuality still reported to Steve Collins. Appellant's Exhibit 1 was introduced into the record and shows the desk audit was requested for the Appellant in September of 2012. Also within Appellant's Exhibit 1 are the Class Specifications for Security Force Manager (grade 13) and Administrative Section Supervisor (grade 15). The Position Description for an Administrative Specialist III is also included in Appellant's Exhibit 1, as is a copy of the Employee Handbook for the Commonwealth of Kentucky. A copy of the Employee Handbook was included because the Appellant testified she was never interviewed during her desk audit as required thereunder.

9. Ms. Burton explained she requested the desk audit because she believed the duties she was performing were more in line with that of a Security Force Manager or an Administrative Section Supervisor.

10. Appellant's Exhibit 2 was introduced into the record and is a copy of the Appellant's Grievance Form filed December 12, 2012, requesting a change in pay grade to an Administrative Section Supervisor (grade 15) or a change in title and pay grade to Security Force Manager (grade 13) with back pay from February 11, 2011 (when the Appellant took over security), plus the removal of the telephone, mail and fuel responsibilities. As shown by letter from Stephen D. Collins dated December 27, 2012, Ms. Burton's grievance was rejected for not having been filed within the timeframe stated in 101 KAR 1:375.

11. Appellant's Exhibit 3 was introduced into the record and is a copy of the Appellant's second Grievance Form which was filed on March 14, 2013. Also included within Appellant's Exhibit 3 is a Position Description Worksheet which was prepared by the Appellant's supervisors, Stephen Collins and Andre Daigle, on or about February 7, 2013. Ms. Burton stated that this worksheet was prepared without her knowledge or input. As a result of her desk audit request, the Appellant was reclassified from an Administrative Specialist III (grade 12) to a Safety Coordinator (grade 13) which became effective February 16, 2013. A response to the Appellant's second grievance was made by Michael A. Jones, the Executive Director of the Office of Management and Administration, for the Department of Military Affairs by letter dated April 16, 2013. In essence, Mr. Jones states that the Appellant's Position Description accurately reflects her job duties as a Safety Coordinator and that as of the result of a meeting between Andre Daigle and Paul Cable held on March 22, 2013, this was understood. Also clarified at the March 22, 2013 meeting was that the job duties listed on the Appellant's grievance were actually the responsibility of the contracted security force (Logan Security, Inc.) and not the responsibility of the Appellant. Therefore, the Appellant's request for back pay was denied. The Appellant then filed her appeal with the Kentucky Personnel Board on or about April 26, 2013.

12. The Appellant reviewed the job duties listed under what was marked for identification purposes as Appellant's Exhibit 4, first page, and stated these duties were the exact duties she listed on her first and second grievances. The additional documents placed in Appellant's Exhibit 4 were included for purposes of demonstrating that the listed job duties (1 through 16) were actually performed by the Appellant.

13. The Appellant explained that prior to her reclassification to a grade 13, when her duties were cut in half, she was performing the duties of a grade 15, Administrative Section Supervisor. Therefore, she now seeks back pay from when she began supervising the security operations at Bluegrass Station until March 2013 when she was reclassified. Finally, the Appellant agreed that once her job duties were cut back, her re-classification as a grade 13 was accurate.

14. The Appellant's testimony marked the end of her case in chief.

15. The Appellee made its motion for a Directed Verdict on the basis that the Appellant failed to meet her burden of proof by demonstrating she performed the job duties of a grade 15 versus that of a grade 12 prior to her reclassification in February, 2013. The motion was held in abeyance pending additional testimony.

16. The first to testify on behalf of the Appellee was **Leslie Stamper**, the Purchasing Branch Manager – Procurement for the Department of Military Affairs since 2009. Appellee's Exhibit 1 was introduced through the witness and is a copy of the Master Agreement between the Commonwealth of Kentucky and Logan Security, Inc. regarding the provision of security services at Bluegrass Station for the year 2012-2013. Mr. Stamper testified that the remaining 19 pages were exactly as shown on the Master Agreement found under the Appellant's Exhibit 5.

17. Appellee's Exhibit 2 was introduced through the witness and is the Master Agreement between the Commonwealth of Kentucky and Logan Security, Inc. for the year 2011-2012. As with Appellee's Exhibit 1, the remaining pages to the contract are the same as found at Appellant's Exhibit 5. According to Mr. Stamper, Logan Security, Inc. provides security guards for the Bluegrass Station Division.

18. Mr. Stamper stated that the Master Agreement found under Appellant's Exhibit 5 set forth the contractual duties of Logan Security, Inc.. One such duty was that Logan Security was responsible for supervising its own employees. Mr. Stamper also noted that under the agreement, the Appellee does not have the authority to hire or fire any of the Logan Security employees, but it can make recommendations.

19. The next to testify was **Crystal Simpson**, who is the Administrative Branch Manager of Personnel and Payroll for the Department of Military Affairs. She has approximately twelve years of personnel and human resource experience and is the personnel records custodian for the Appellee.

20. Appellee's Exhibit 3 was introduced into the record and is a copy of the Position Description for an Administrative Specialist III. Appellee's Exhibit 4 was introduced into the record and is a copy various e-mails whereby Ms. Simpson attempted to determine whether the Appellant ever qualified for the classifications of Administrative Section Supervisor or Administrative Branch Manager. The response from Maureen Travers was that the Appellant had been rejected for Administrative Section Supervisor in 2008, but had never been evaluated for Administrative Branch Manager. In addition, Ms. Travers opined that the Appellant would not currently meet the qualifications for either title because she did not have any professional level experience. Appellee's Exhibit 5 was introduced into the record and is a copy of the Job Specification for Administrative Section Supervisor (grade 15). Appellee's Exhibit 6 was introduced into the record and is a copy the Appellant's application dated March 12, 2013. Also attached thereto was a letter from Teresa Lee dated April 4, 2013, wherein the Appellant's application for the Administrative Section Supervisor position was denied.

21. Appellee's Exhibit 7 was introduced into the record and demonstrates that Michael A. Jones had been assigned Appointing Authority by Brigadier General Edward W. Tonini (RET).

22. Ms. Simpson was asked to review the reclassification process. She explained that an employee's supervisor initiates a desk audit request and then submits an updated Position Description that may or may not show the necessary permanent and material change(s) in the employee's job duties. The desk audit request is then sent to the Appointing Authority who determines whether it can be performed in-house. If it cannot, then the authorization to perform the desk audit is sent to the Personnel Cabinet.

23. For the Appellee, Ms. Simpson receives the updated Position Description from the employee's supervisor. She stated that the employee has to agree with the new Position Description before it is placed in the system. According to Ms. Simpson, the updated Position Description controls the employee's grade level.

24. Ms. Simpson testified she received a copy of the Appellant's application, marked as Appellee's Exhibit 6, after the Appellant had applied for the position of Administrative Section Supervisor. Ms. Simpson noted that when an application is for merit system employment, the Personnel Cabinet is responsible for determining if an applicant meets the minimum job requirements. In this particular instance, Ms. Simpson explained that the Appellant did not meet the minimum requirements. Specifically, she did not have the

educational background or experience necessary. Although not required, Ms. Simpson asked for a second opinion from Maureen Travers (whose job at the Personnel Cabinet is to review applications to determine whether the applicant's meet the minimum requirements).

25. Ms. Simpson talked with both Andre Daigle and Paul Cable about the Appellant's job duties. They both told her the Appellant had no supervisory duties which conflicted with the initial draft of the Position Description. Once the questions about the Appellant's supervisory duties were cleared up, Ms. Simpson changed the final Position Description to reflect the same.

26. According to Ms. Simpson, a change in pay is not retroactive from the date the pay grade is changed and approved by the Appointing Authority. In coming to this conclusion, Ms. Simpson relied on KRS 18A.005(30).

27. On cross-examination, Ms. Simpson was asked to review Appellant's Exhibit 1, specifically the Kentucky Employee Handbook, under desk audit. Ms. Simpson testified she relies on the supervisor's verification that he or she met with the employee during the desk audit process. She noted that when the Personnel Cabinet performs a desk audit, it is required to interview the employee.

28. The Appellant's desk audit was performed December 27, 2012. According to Ms. Simpson, if it is determined an employee is performing the duties of a higher class specification but does not meet the minimum requirements for that class specification, the employee needs to stop performing those duties. In the Appellant's case, the desk audit request was worked in-house and after an understanding as to the Appellant's job duties had been reached with her supervisor, the audit was ended. According to Ms. Simpson, based upon the contents of her application, the Appellant did not meet the minimum specifications for Administrative Section Supervisor because she did not have a college degree or enough administrative experience.

29. The next to testify was **Andre Daigle**. Mr. Daigle has been the Administrative Branch Manager the Bluegrass Station since December of 2009 and the Appellant's immediate supervisor since February 2013.

30. Mr. Daigle stated that he and Paul Cable met with the Appellant in the spring of 2013 and went over her new Position Description line-for-line. He gave the Appellant specific instructions on what duties to perform and told her point blank that she was not to supervise the Logan Security, Inc., employees.

31. On cross-examination, Mr. Daigle reviewed Appellant's Exhibit 3 and agreed that when he and Mr. Collins first filled out and signed the same, they initially stated the Appellant had supervisory duties. That was later changed once it had been determined the Appellant could not supervise the Logan Security, Inc. employees pursuant to the terms of the contract between Logan Security, Inc. and the Commonwealth. Mr. Daigle explained that rather than "supervisory" duties, "oversight" duties would have been a better description of the Appellant's actual job duties.

32. When asked to review the list of job duties found under the Appellant's Exhibit 4, Mr. Daigle agreed that the Appellant performed the duties noted under 1, 6, 8, 9, 12, 13, 14, 15 and 16. As for the supervisory duties listed under #2, again, Mr. Daigle stated that oversight would have been a better word to use. He also agreed the duties listed under #3 had been performed by the Appellant, but were taken from her after she was reclassified in February 2013. The Appellant also performed the duties noted under #4, but she had no actual authority. This was left up to Logan Security. As for the duties under #7, the Appellant would interpret this and bring it to him so they could talk about it before he made the final determination. As for the job duties listed under #10, Mr. Daigle noted the gate register was prepared by the Logan Security staff and later reviewed by the Appellant. Finally, Mr. Daigle stated the Appellant did prepare slides and spreadsheets for meeting purposes.

33. The next to testify at the hearing was **Paul Cable**. Mr. Cable is the Assistant Director at the Bluegrass Station and Mr. Daigle's immediate supervisor. He was also the Appellant's second-line supervisor. Mr. Cable testified that the Appellant did not supervise the Logan Security, Inc., employees.

34. The next to testify at the hearing was **Steve Collins**. Mr. Collins has been the Director of Bluegrass Station since August 2008. He testified that between February 2011 and February 2013, at least during some period of that time, he was the Appellant's immediate supervisor. That responsibility was later transferred to Andre Daigle.

35. Because of ongoing problems with the security staff's judgment, in February 2011, Mr. Collins asked the Appellant to keep an eye on the Logan Security staff for him. According to Mr. Collins, because its basic responsibility under its contract with the Commonwealth was to simply to provide guards, if things really went awry at the Bluegrass Station, Logan Security would not be held responsible. As such, the Appellant kept an eye on the Logan Security staff and reported back to Mr. Collins. She would also occasionally make recommendations.

36. On cross examination, Mr. Collins admitted he did not have a face to face interview with the Appellant during the desk audit process but noted that instead, drafts of the proposed Position Description were passed back and forth with Appellant.

37. The end of Mr. Collins' testimony marked the end of Appellee's rebuttal and the evidentiary record was closed.

38. The Appellee renewed its Motion for a Directed Verdict and asked that the appeal be dismissed on the basis that the applicable one year statute of limitations expired sometime in February 2012.

39. The Hearing Officer has considered the entire administrative record, including the testimony and statements therein.

FINDINGS OF FACT

1. The Appellant, Elizabeth Burton, alleges that between February 2011 and February 2013, despite being classified as an Administrative Specialist III (grade 12), she performed the work of an Administrative Section Supervisor (grade 15) and is, therefore, entitled to back pay commensurate with performing the duties of an Administrative Section Supervisor (grade 15).

2. The Appellant, a classified employee with status, filed her appeal with the Personnel Board on April 26, 2013, requesting that her most recent grievance filed in March of 2013 be reviewed and that she be awarded back pay for the two year period she claims to have performed the duties of a an Administrative Section Supervisor (grade 15).

3. The testimony of Steve Collins, the Director at the Bluegrass Station Division and the Appellant, demonstrates that on or about February 2011, the Appellant was assigned the task of overseeing the security staff provided at the Bluegrass Station by Logan Security, Inc. thereby resulting in a material increase in her job duties. At that point in time, the Appellant was classified as an Administrative Specialist III (grade 12).

4. On or about September 11, 2012, the Appellant requested a desk audit of her position as an Administrative Specialist III at the Bluegrass Station (See Appellant's Exhibit 1). As required, a Position Description Worksheet was prepared by her supervisors, Steven Collins and Andre Daigle which was signed off on February 7, 2013. Evidence indicates the Appellant was not interviewed personally during the auditing process, but that a draft of the Position Description worksheet was passed back and forth between the Appellant and her supervisors before being finalized. In addition, a meeting was held between the Appellant and her immediate supervisor, Andre Daigle, and the Assistant Director at the Bluegrass Station, Paul Cable, on March 22, 2013, during which the said Position Description was reviewed and discussed thoroughly. In addition, many of the Appellant's previous job duties were eliminated. As a result of the desk audit, the Appellant was reclassified on February 16, 2013, to Security

Coordinator (grade 13) (See Appellant's Exhibit 3).

5. The evidentiary record demonstrates that the Appellant performed duties outside her class from February 7, 2011, through February 15, 2013.

CONCLUSIONS OF LAW

1. On or about February 7, 2011, the Appellant's immediate supervisor, Steve Collins, placed upon the Appellant the responsibility of providing heightened oversight over the contract security staff provided to Bluegrass Station by Logan Security, Inc. This directive materially changed the Appellant's job duties and responsibilities and increased her level of responsibility without a reclassification.

2. Such increase in the Appellant's level of responsibility without a reclassification constitutes a penalty as defined by KRS 18A.005(24). However, the Appellant did not receive written notice of her right to appeal such penalization as provided in KRS 18A.095(8).

3. The Appellant, Elizabeth Burton, a classified employee with status, failed to timely file her appeal with the Personnel Board within the one-year limitations period provided for under KRS 18A.095(29).

4. Having failed to timely file her appeal, the Personnel Board lacks the required jurisdiction under the provisions of KRS 18A.005, *et sec*, to hear the Appellant's appeal.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **ELIZABETH BURTON VS. DEPARTMENT OF MILITARY AFFAIRS (APPEAL NO. 2013-097)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

Any document filed with the Personnel Board shall be served on the opposing party.

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

ISSUED at the direction of **Hearing Officer Geoffrey B. Greenawalt** this 20th day of May, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Michael Van Leuven
Ms. Elizabeth Burton